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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CHRIS T. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

SHEILA T.,

Defendant and Appellant.

D057071

(Super. Ct. No. NJ13844A-C)

APPEAL from a judgment of the Superior Court of San Diego County, Blaine K.

Bowman, Judge. Affirmed.

Sheila T. appeals a judgment terminating her parental rights to her minor children Chris T., Emily T. and A.T. (collectively the minors) under Welfare and Institutions Code¹ section 366.26. Sheila contends: (1) the court abused its discretion by denying

¹ Statutory references are to the Welfare and Institutions Code.

her section 388 petition for modification seeking to have the minors placed with her; and (2) the evidence was insufficient to support the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating Sheila's parental rights. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Five-year-old Chris, four-year-old Emily and one-year-old A.T. came to the attention of the San Diego County Health and Human Services Agency (the Agency) in January 2008. Sheila and Sergio, the minors' father, engaged in violent confrontations in the family home. The Agency reported that the family had a history of domestic violence referrals. The latest confrontation involved Sheila kicking holes into a bedroom door in the presence of the minors. Sergio also choked Sheila and she threw a statue at him. The police arrested Sheila and Sergio. Chris and Emily witnessed the violent altercation between their parents and stated they were "scared." The minors were taken into protective custody.

The Agency filed petitions and a detention report on behalf of the minors. An Agency social worker met with Chris and he disclosed he witnessed violence in the family home. He saw his parents fight and heard them yell profanities at each other. He admitted he felt scared when his parents fought with one another. In addition to violence, Chris had seen Sheila drink alcohol until she became drunk. Emily reported she also saw her parents fight and say "bad words." Emily also saw Sheila kick and break a door in the home. A.T. was one year old and could not make a statement because of her young age.

The court held a detention hearing and detained the minors in out-of-home care. The court ordered Sheila receive supervised visits with the minors.

An Agency social worker met with and interviewed Sheila. Sheila admitted to having a problem with drugs and alcohol. She drank heavily and abused methamphetamines about one month before the latest domestic violence incident. The social worker recommended Sheila participate in services including domestic violence classes, parenting education and counseling sessions. The court held a jurisdiction and disposition hearing. The court declared the minors dependents and ordered Sheila to comply with her case plan, which included participation in the Substance Abuse Recovery Management Systems (SARMS) program.

During the next six months, Sheila participated in services. She completed a parenting education program, and participated in therapy and a domestic violence program. The court granted an additional six months of reunification services and ordered Sheila to participate in visits with the minors. At the time the six-month review hearing took place, the minors were living with their paternal grandparents.

In January 2009, the Agency filed a 12-month review report. Sheila and Sergio continued to have contact with each other and, upon further investigation, an Agency social worker learned the parents continued to fight with each other. Reports surfaced that the parents lived together in the same apartment. In October 2008, a neighbor heard objects hitting a wall and Sheila screaming at Sergio. The police investigated the situation. Chris was present during this latest incident. He confirmed his parents had fought and that he saw Sheila throw a bottle at Sergio.

Sheila continued to participate in services, including domestic violence classes. Sheila's attendance at her therapy sessions was sporadic. Her therapist reported Sheila did not attend therapy on a regular basis and missed more than half of her scheduled appointments. The therapist terminated sessions and the social worker gave her additional referrals.

Sheila claimed she had taken responsibility for her anger management issues and was going to move out of Sergio's apartment. However, she denied that she threw a bottle at Sergio in October 2008. By December 2008, Sheila claimed she no longer saw Sergio but sometimes would speak to him by telephone. The social worker explained to Sheila the importance of continuing counseling and being honest about any future interactions with Sergio. Even though Sheila maintained she did not see Sergio and was no longer living with him, the social worker saw Sheila's car parked in front of Sergio's home on more than one occasion. Sheila had also been seen at the home.

Violent confrontations between Sheila and Sergio continued in the months leading to the 18-month review hearing. The police arrested Sheila and charged her with inflicting corporal injury on a spouse. Sergio reported Sheila attacked him and scratched his neck. His injuries were confirmed in a police report.

Sheila's participation in her case plan had become sporadic. She did not complete a domestic violence program. She remained in therapy and her therapist, Ben Edwards, recommended Sheila continue in both individual and group therapy sessions.

Sheila initially visited the minors on a daily basis and went to the minors' grandparents' home to help with the minors. Later, there were periods of time during

which the frequency of Sheila's visits with the minors fluctuated. Sometimes she would see them on a weekly basis and sometimes she missed visits. Chris and Emily initially wanted to go home to Sheila, but as time passed they stopped asking their caregivers about when they would return to Sheila's care.

At the 18-month review hearing, the court terminated reunification services, scheduled a section 366.26 hearing and ordered the Agency to prepare an assessment report.

Social worker Monica Prokesch submitted an assessment report and assessed the minors as adoptable. The minors currently lived with their grandparents and the grandparents had an approved adoptive home study. They wanted to adopt the minors. In addition to the minors' relatives, there were two families in San Diego County interested in adopting the minors. There were an additional 37 out-of-county families interested in adopting the sibling set. Numerous other families had been approved to adopt individual minors. Prokesch spoke with Chris and Emily and asked them what they thought about being adopted by their grandparents. Neither Chris nor Emily raised any objections to adoption.

Prokesch concluded there was no beneficial parent-child relationship between Sheila and the minors. She further stated the benefits of adoption outweighed the detriment of terminating parental rights. The minors recognized Sheila as their mother and would display affection toward her. Emily and Chris referred to Sheila as "mommy" during some visits. However, the minors did not perceive Sheila as a consistent figure in their lives. When Sheila did not attend A.T.'s birthday party, Emily stated "[Sheila] says

she is going to come but she doesn't." Chris stated that Sheila "lies" about coming to see them. Further, the minors did not seek Sheila to meet their needs. They instead looked to their caregivers. Prokesch noted that when A.T. started preschool, she cried and asked for her caregivers. She did not ask for Sheila. The minors did not cry or ask to call Sheila after she missed visits. The minors displayed no signs of distress at the end of visits with Sheila.

In December 2009, Sheila filed a section 388 modification petition. She requested the court modify its previous order and return the minors to her custody. She further requested additional services. She claimed her circumstances had changed because she had made substantial progress in therapy. She also claimed she would not resume a relationship with Sergio. Sheila asserted it was in the minors' best interests to be returned to her custody because they could remain in her care as a sibling set and avoid the pain of going through an adoption.

The Agency opposed Sheila's section 388 petition. Prokesch reported that Sheila had not completed a domestic violence program. The program consisted of 52 weekly sessions. Sheila had 31 weeks of sessions remaining. Prokesch confirmed Sheila continued to live with Sergio. Her relationship with Sergio continued to be a main focus of her life as evidenced by the fact Sheila would ask the minors about Sergio during visits. The minors expressed their frustration toward Sheila for always asking them about their father.

In a January 2010 addendum report, Prokesch noted that Sheila had been invited to spend the Christmas holiday with the minors but she did not visit or call them. Sheila visited the minors on New Year's Eve for about one hour.

Contested Section 388 and Section 366.26 Hearing

The court held a contested section 366.26 hearing in March 2010. The court received in evidence the Agency's assessment report and various addendum reports. The court heard testimony from several witnesses, including Prokesch, Sheila and Sheila's therapist, Ben Edwards.

Prokesch testified the minors did not object to being adopted. Christ stated his first preference was to live with his father, followed by his caregivers. Emily preferred to live with her caregivers. The minors were well cared for by their relative caregivers and Prokesch stated the minors looked to the caregivers as their primary parental figures.

Sheila completed a parenting program and graduated from SARMS. She was in the process of completing her domestic violence program. Edwards reported that Sheila was making progress in her therapy sessions.

Prokesch did not believe Sheila was applying what she had learned in her domestic violence classes. Sheila had been provided more than two years to complete a one-year domestic violence program. She had yet to complete the program. Prokesch noted that even while Sheila participated in the program, she continued to engage in violent confrontations with Sergio. In November 2009, Sheila engaged in a verbal dispute with Sergio by telephone. The minors' grandfather removed the minors from the

home so that they would not hear the dispute. Prokesch believed this altercation showed Sheila was not applying what she had learned in her domestic violence classes.

Prokesch opposed Sheila's section 388 petition. She believed it was not in the minors' best interests to return them to Sheila's custody. The minors had lived with the relative caregivers for about two years. Sheila had several opportunities to comply with a domestic violence program and had yet to do so.

Edwards testified he addressed domestic violence with Sheila during their therapy sessions. Sheila participated in individual counseling sessions and in group sessions. Edwards believed Sheila had made progress because she took responsibility for her actions. She had a good attitude in her group sessions. He believed it was in the minors' best interests for the reunification period to continue.

Edwards did not know of any altercations between Sheila and Sergio between July 2009 and March 2010. However, Edwards stated Sheila would benefit from an additional six months of services. He believed she needed to participate in a parenting class and testified that Sheila's work "[would] never be complete." He had not observed any interactions between Sheila and the minors. Edwards was aware that Sheila had not completed a domestic violence program.

Sheila testified she currently lived with the minors' maternal grandmother in a two bedroom apartment. She worked full-time and was enrolled in a nursing program. Sheila completed parenting classes and the SARMS program. Sheila claimed she no longer had a relationship with Sergio as of March 2010. She did not have any plans to reunite with him.

Sheila admitted she acted violently toward Sergio in February 2009. She threw a wrench at Sergio's car and the wrench hit a wall. She also threw picture frames against a wall. The police arrested Sheila following the incident. It was Sheila's fourth arrest for domestic violence. Sheila claimed she was not the aggressor in the incident but admitted she pleaded guilty to the charges against her.

Sheila testified she visited the minors and all of the visits were supervised by the minors' caregivers. She claimed she saw the minors once during the week and every other weekend.

The court, after hearing testimony, found that Sheila did not show her circumstances had changed. The court noted Sheila's repeating pattern of confrontations with Sergio and that Sheila did not seem to have an ability to control her anger. The court found there was no showing that the domestic violence would cease or that Sheila would be able to protect the minors from future violence. The court also found it was not in the minors' best interests to return to Sheila's custody. The minors had been living with their grandparents for more than two years and were thriving in their placement. Given the absence of assurance that there would be no further incidents of domestic violence, the court found the minors needed stability and permanency in their lives. The court denied Sheila's section 388 petition.

The court further found by clear and convincing evidence that the minors were adoptable and the beneficial parent-child relationship exception under section 366.26, subd. (c)(1)(B)(i), did not apply to preclude terminating parental rights. The court found

Sheila regularly visited the minors. However, the court did not find that the relationship between the minors and Sheila outweighed the benefits of adoption.

DISCUSSION

Sheila argues the court abused its discretion by denying her section 388 modification petition. She asserts her circumstances had changed because she made substantial progress in her therapy sessions. Sheila further asserts it was in the minors' best interests to be returned to her custody because she no longer poses a risk to the minors, the minors share a relationship with her and she would ensure the minors remain together in the same home.

A

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, and the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) Whether a previous order should be modified and a change would be in the child's best interests are questions within the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court's order will not be disturbed on appeal unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. When two or more inferences can be reasonably deduced from the facts, we have no authority to reweigh the evidence or substitute our decision for that of the trial court. (*In re Stephanie M.*, at pp. 318-319.)

B

Sheila asserted in her petition that circumstances had changed because she continued to participate in therapy sessions and domestic violence classes. However, Sheila had been given more than two years to complete a 52-week domestic violence program. At the time of the section 388 hearing, she still had 31 weeks remaining in the program. Edwards acknowledged Sheila had made progress with services and he believed she had ended her relationship with Sergio. However, Edwards testified that Sheila's "work . . . [would] never be complete Her work will always go on. It's going to be a process of [Sheila] growing and understanding and acceptance." He further testified Sheila would require at least six additional months of services.

In addition to needing to complete a domestic violence program, Prokesch stated the record shows Sheila was not applying what she was learning in therapy or her domestic violence classes. In February 2009 and November 2009, there were reports of violence or verbal altercations between Sheila and Sergio. These incidents took place even though Sheila was actively participating in services. Sheila's recent progress with services in the context of her history showed her circumstances were merely "changing," but they had not changed sufficiently to warrant returning the minors to her custody. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 48.) A petition that alleges merely changing circumstances does not promote stability for the child or the child's best interests because it would mean delaying the selection of a permanent home to see whether a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future time. (*In re Casey D.*, at p. 47.)

"'Childhood does not wait for the parent to become adequate.'" (*In re Baby Boy L.*, at p. 610.)

Even had Sheila shown changed circumstances, she did not show returning the minors to her custody or providing further reunification services was in the minors' best interests. After termination of reunification services, the focus of the proceedings shifted from family preservation to providing the minors with a safe, stable, and permanent home. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) The problems that led to the dependency were serious. Sheila repeatedly engaged in domestic violence in the presence of the minors. The minors reported they witnessed violence and were afraid. The record shows a recent domestic violence altercation took place in February 2009 and another verbal altercation took place in November 2009. Sheila admitted having four domestic violence related arrests. Sheila had been given more than two years to complete a domestic violence program and she still had 31 weeks left to complete her program. Her therapist testified Sheila had yet to complete her treatment and needed at least six more months of services. At the time of the hearing on the section 388 petition, the minors had been out of Sheila's custody for more than two years. During this time, Sheila was not consistently involved in parenting her children, and by the time of the section 388 hearing, she had not progressed beyond supervised visits. The record shows Chris and Emily were thriving in the care of their grandparents and were comfortable with being adopted. It was not in the minors' best interests to postpone implementing a permanent plan of adoption. The court acted within its discretion by denying Sheila's section 388 modification petition.

II

Sheila challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i), did not apply to preclude terminating her parental rights. She asserts she maintained regular contact with the minors and shared a significant relationship with them.

A

We review the judgment terminating parental rights for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*)) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order, and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.*, *supra*, 24 Cal.App.4th at p. 610.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the child under one of six specified exceptions. (§ 366.26, subd. (c)(1)(B)(i)-(vi); *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

Section 366.26, subdivision (c)(1)(B)(i), provides an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the [parent-child] relationship" to refer to a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Although day-to-day contact is not required, it is typical in a parent-child relationship. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) The parent must show he or she occupies a parental role in the

child's life, resulting in a positive and emotional attachment from child to parent.

(*Autumn H.*, at p. 575; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

B

The court found Sheila regularly visited the minors. However, she did not meet her burden of showing her relationship with the minors was sufficiently beneficial to warrant a permanent plan other than adoption.

The record shows Sheila had some degree of a relationship with Chris and Emily. A.T., however, had been out of Sheila's custody for most of her life. The supervised visits between the minors and Sheila were appropriate. She displayed affection toward the minors and they enjoyed seeing her. Although Sheila had appropriate visits with the minors, she did not occupy a parental role in the minors' lives. She did not care for the minors on a consistent basis, take them to school or to their medical appointments. The current caregivers instead are dedicated to the minors and want to provide them with a permanent home. The record shows the minors were thriving in their current placement. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) There was no evidence the minors had a "significant, positive, emotional attachment" to Sheila so that terminating the parent-child relationship would result in great harm to them. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) The minors did not cry for Sheila at the end of visits, or ask for her or ask to call her in between visits.

Further, Sheila did not show that maintaining the relationship with the minors outweighed the benefits of adoption for them. The minors had lived with the caregivers

for about two years and, during this time, Sheila had yet to resolve the issues that led to the minors' removal and caused them to experience turmoil and instability. The caregivers were committed to adopting the minors, who need the stability and permanence of adoption. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 191 [child's interest in stable and permanent home is paramount once a parent's interest in reunification is no longer at issue].) The court was required to, and did, weigh the strength and quality of the parent-child relationship, and the detriment involved in terminating it, against the potential benefit of an adoptive home for the minors. We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.) The minors, whose needs could not be met by Sheila, deserve to have their custody status promptly resolved and their placement made permanent and secure. Substantial evidence supports the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating Sheila's parental rights.

DISPOSITION

The judgment is affirmed.

MCDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.